LEE KUAN YEW

v.

SEOW KHEE LENG

HIGH COURT, SINGAPORE
RODERICK E. MARTIN (REGISTRAR)
[SUIT NO. 9332/84]
8 APRIL 1985

CIVIL PROCEDURE: *Defamation - Remarks uttered by defendant against plaintiff at election rally - Apology - Plaintiff issued writ against defendant - Whether plaintiff's cause of action has been compromised and extinguished by "accord and satisfaction".*

The plaintiff, who is the Prime Minister of Singapore, is suing the defendant for defamation arising out of certain remarks uttered by the defendant at an election rally. Upon the utterance of these defamatory remarks, the plaintiff's solicitors wrote to the defendant asking him to apologise on terms and a draft apology was read out by the defendant later. This apology was also published in the four national newspapers. However, a writ was still issued against the defendant. The defendant is now seeking to either stay or dismiss the plaintiff's action under the inherent jurisdiction of the Court on the ground that the plaintiff's cause of action has been compromised or extinguished by "accord and satisfaction".

Held:

[1] In determining whether there has been accord and satisfaction, the Court will ascertain the nature of the obligation by construction of the contract. Once this is done, the performance of the obligation has to be measured to see if the performance fulfils the obligation.

[2] That on the evidence the defendant did not comply with all the terms of compromise set out by the plaintiff's solicitors.

[3] The evidence showed that the whole question of accord and satisfaction was irrelevant since the defendant hadn't read the letter of apology in time for its acceptance.

[4] The application by the defendant should fail as it was procedurally misconceived and neither has the defendant shown how he would be prejudiced if the plaintiff's action went to trial.

[Application dismissed with costs.]

Cases referred to:
British Russian Gazette Ltd. v. Associated Newspapers Ltd. [1933] 2 KB 616
Margaronis Navigation Agency Ltd. v. Henry W. Peabody & Co. of London Ltd. [1965] 1 QB 300
Quenerduaine v. Cole [1883] 32 WR 185
Maclaine v. Gatty [1921] 1 AC 376
Hughes v. Metropolitan Ry. [1877] 2 AC 439
Low v. Bouverie [1891] 3 Ch 82
Bremer v. Vanden [1978] 2 Lloyd's Rep 109
The Scaptrade [1983] 2 All ER 301
Re Goile [1963] NZLR 666
Eyre v. Wilson & Horton Limited [1967] NZLR 769
Kontvanis v. O'Brien [1958] NZLR 502; [1957] NZLR 890
Eyre v. NZPA [1968] NZLR 736

Other source referred to:
Estoppel by Representation, Spencer Brower, 3rd Edn.

For the applicant/defendant - Cheong Yuen Hee (Subhas Anandan with him)
For the respondent/plaintiff - J. Grimberg

JUDGMENT

Roderick E. Martin (Registrar):

In this case, the Prime Minister, Mr. Lee Kuan Yew (hereinafter referred to as the plaintiff), is suing Mr. Seow Khee Leng, Secretary General of the Singapore United Front, (hereinafter referred to as the defendant), for defamation arising out of certain remarks uttered by the defendant at an election rally held on 15 December 1984. The exact form these remarks took is not relevant for the purposes of this application.

Upon the utterance of these defamatory remarks, the plaintiff's solicitors wrote to the defendant enquiring whether he was prepared to apologise **on terms,** enclosing together with the letter a draft apology prepared by the plaintiff's solicitors. This letter was both dated and delivered to the defendant's place of residence on 19 December 1984.

The draft apology was read out by the defendant at his party's rally at Bedok North Avenue 2 on 21 December 1984. The apology was also published in the four national newspapers on 28 December 1984, save for one which appeared the day before. Notwithstanding these two acts of the defendant, a writ was issued against him on 21 December 1984 and served on him on 27 of same month. The defendant is now seeking by his application entered No. 2515 of 1985 to either stay or dismiss the plaintiff's action under the inherent jurisdiction of the Court on the ground that the plaintiff's cause of action has been compromised and, accordingly, extinguished by what is legally described as "accord and satisfaction".

Accord and Satisfaction

It is necessary for the determination of this application to ascertain what is meant by "accord and satisfaction". In this respect, I am guided by a passage in Scrutton LJ's judgment in *British Russian Gazette Ltd. v. Associated Newspapers Ltd.* [1933] 2 KB 616:

> Accord and satisfaction is the purchase of a release from an obligation whether arising under contract **or tort** by means of any valuable consideration, not being the actual performance of the obligation itself. The accord is the agreement by which the obligation is discharged. The satisfaction is the consideration which makes the agreement operative.
> (Emphasis is mine).

It is clear from this passage that the operation of "accord and satisfaction" is nothing more than the ordinary application of the law of contract, though the subject matter of the contract may well concern a tort.

The approach a Court should take in determining whether there has been "accord and satisfaction", both in law and fact, is well settled and the best exposition of it appears in Roskill J's judgment in *Margaronis Navigation Agency Ltd. v. Henry W. Peabody & Co. of London Ltd.* [1965] 1 QB 300:

> Where the question arises whether a particular obligation has been performed, the first thing that has to be done is to ascertain the nature of the obligation. That depends upon the construction of the contract, and the construction of the contract is, of course, a question of law. But that is only one part of the equation. Having ascertained what the obligation is, one then has to measure the performance, and see whether the performance fulfils the obligation. That again ultimately is either a question of law or a question of mixed fact and law; not perhaps in every case, but in a great many cases.

The importance of ascertaining the exact terms of the compromise or "obligation", as Roskill J puts it, is that it determines the question of whether or not the plaintiff can rely on his original cause of action. If, for instance, the promised or actual forbearance to pursue the claim is construed as being in return for the promised performance of some act by the other, or whom I would call the offending party, the agreement will be regarded as one involving the immediate discharge of the claim. But if the promised or actual forbearance is construed as being in return for the **actual performance** of some act by the offending party, the claim forborne will not be discharged until such performance takes place (see, the *British Russian Gazette's* case, *supra*), and if in this respect the offending party fails to perform the terms of the compromise, the other party has an option to either accept the offending party's repudiation of the compromise and re-assert his original claim or affirm the compromise and sue upon it.

Terms of compromise

The offer of compromise by the plaintiff was made in his solicitor's letter dated 19 December 1984. The offer was made on the following terms:

> We are therefore writing to ask you whether you are prepared to publish, at your expense, an apology in the terms of the draft now enclosed. Our Client requires the apology (i) to be published immediately and with appropriate prominence in national Chinese, English, Malay and Tamil newspapers, and (ii) to be read by you at the next Singapore Union (**sic**) Front rally following delivery of this letter. Mr Lee further requires you to give us your assurance and undertaking in writing that you will not repeat the same or similar statements concerning him.
>
> We require to know if you are prepared to indemnify our Client in respect of the costs to which he has put in the matter, which we now estimate at $500.
>
> Finally, we are further instructed to inform you that our Client claims damages. If you proceed in accordance with the preceding two paragraphs, our Client will accept nominal damages of $1,000.

It is clear, on reading these three paragraphs, that the plaintiff was not asking the defendant, in return for his release of the defendant's liability, to promise to perform the terms enumerated therein. What the plaintiff was making was an offer to release the defendant from his liability in consideration of the defendant's **actual performance** of these terms, as I must repeat, in emphasis, the sentence, "If you **proceed** in accordance with the preceding two paragraphs, our Client will accept nominal damages of $1,000." The letter of offer also stated that in the "meantime" i.e. between the time of delivery of the letter and the actual performance of the terms of offer, the plaintiff reserved "all his rights in the matter". In law, this reservation has the effect of relieving the plaintiff from having to comply with any procedural requirement that may become necessary as a result of his having made an offer of compromise, should he decide to proceed in defamation, as his "rights" are kept intact. Accordingly, it is clear that should the defendant not perform these terms proposed, the plaintiff would have the right to elect whether he wants to sue on his original cause of action (i.e., defamation) or affirm the compromise and sue upon it.

Before I examine each of the terms of the offer and their alleged performance, I am obliged by virtue of Roskill J's test to point out that the terms of offer as reproduced earlier were that appearing in the plaintiff's solicitors' letter dated 19 December 1984. The word "Union" under (ii) was clearly a typographical error on the part of the plaintiff's solicitors as it should obviously have read "United". It is obvious because the defendant's party was correctly described both in the second paragraph of this letter and in another letter of the same date and delivered at the same time, written on behalf of all the Ministers of Government, including

the plaintiff in this suit, and which, except for factual differences, was similar in all respects. Even the defendant understood it to be so, as his conduct as his party's rally on 21 December 1984 and thereafter, and his affidavit supporting this application, would show.

Our Client requires the apology (i) to be published immediately and with appropriate prominence in national Chinese, English, Malay and Tamil newspapers.

On a plain reading of this term, what was contemplated by it was for the apology in the draft prepared by the plaintiff's solicitors to be published "immediately" by the defendant in the various national newspapers.

Was this done? On the defendant's affidavit itself, the answer is clearly "no". The defendant has deposed in his affidavit that the plaintiff's solicitors' letter was delivered to his residence on 19 December 1984. The defendant has also shown by way of exhibits annexed to his affidavit that the publication sought by the plaintiff was effected on 28 December 1984, save for one which appeared the day before. In this respect, the defendant has admitted in his affidavit that it was only at about 2 p.m. on 23 December 1984, a Sunday, that he "tried to make arrangements for the apologies, in terms of the plaintiff's solicitors' draft to be published in the four language dailies". That is to say, arrangements for the apology to be published in the four national newspaper were only made after polling day.

The natural and ordinary meaning of the word "immediately" is "forthwith". The word implies "speedy and prompt action and an omission of all delay; in other words, that the thing to be done should be done as quickly as it is reasonably possible" (per Cockburn CJ, *R. v. Berkshire Justices*, 4QBD 469). It is natural for the plaintiff to have wanted the sting of the defamatory remarks removed or at any rate lessened before polling day, 22 of December 1984. It does not take much to understand that defamatory remarks pertaining to a politician's integrity and honesty and the party he represents can adversely affect the minds of the electorate, especially at election time. In short, the plaintiff wanted to nip it (the defamatory remarks) in the bud **before** polling day.

Regrettably, the defendant has not complied with this term. The defendant instead has attempted in his affidavit to explain the delay. First, he says that the plaintiff's solicitors' letter which was delivered on 19 December 1984 was placed "on the table where they were subsequently covered by the newspapers" and it was only on 21 December 1984 that he became aware of its delivery and contents. In my opinion, there is no merit in this explanation. It is clear that the law does not countenance a failure to perform a term of a contract within the agreed or stipulated time caused wholly or in part by a party's own act or default. *A fortiori*, if he could not, by the same cause(s), perform a term of the offer. The act or default need not be deliberate, "the shiftless, the dilatory, or the unfortunate" are not spared.

In this connection, it is pertinent to note that there was no attempt at acceptance by the defendant of the plaintiff's offer until the conversation of 26 December 1984 between the defendant and Mr. Elias who was standing in for Mr. Grimberg, the Counsel for the plaintiff. The fact that the defendant read out the apology at a Singapore United Front rally on 21 December 1984 does not in law amount to acceptance, as the reading out of the apology was only one of the terms of the offer and it is settled law that acceptance must be of **all** the terms of the offer (see, *Quenerduaine v. Cole* [1883] 32 WR 185).

Second, the defendant says in his affidavit that upon reading the letter on 21 December 1984, he went immediately to his party's headquarters "to discuss with" his "colleagues". Upon his discussion, "a meeting of the party's central committee was immediately called." It was then decided by his party's central committee that he "should accept **all** the terms of

offer of compromise and settlement." I find no merit in this explanation as it was the defendant and not his party that the said letter was addressed to. Furthermore, the letter drew the defendant's attention to the prospect of a suit, not against his party but against him, should he fail to perform the proposed terms. In the circumstances, I fail to see any necessity for the central committee meeting as it could only add up to delay, with the consequence that the plaintiff's offer could well have lapsed in the meantime, having regard to the purpose and subject matter of the offer of compromise, particularly the date and time of delivery of the said letter, its contents and the date of the impending elections. Indeed, the defendant's affidavit is silent as to why, if such was his party's central committee's decision, he did not make arrangements for the apology's publication on that very day of the meeting (i.e. 21 December 1984)

In my opinion, it is a strain on the words "immediately" to accept any suggestion that the publication of the apology five to six days after polling day was performance of this term of the offer of compromise. It was as if in acknowledgment of this insurmountable difficulty that the defendant's Counsel was driven in despair to mount the argument that the plaintiff had somehow wavied strict adherence to this term as well as the other terms of the offer. He placed heavy reliance on a paragraph in the defendant's affidavit which covers an event which took place on 26 December 1984. This paragraph reads:

> We returned to the party's headquarters after lunch. I then telephoned the office of Drew & Napier and was told that Mr. Grimberg was on leave and that Mr. Elias was in charge of the matter. I was then put through to Mr. Elias. I informed him that I had received "SKL1" and "SKL2" and accepted all the terms of settlement or compromise stated therein. I then asked him what the size of the apologies should be as it was not stated in "SKL1" and "SKL2". What was meant by "appropriate prominence". I informed him the sizes of the advertisements I had placed with the newspapers. He said they were inadequate. I then asked him what size would be adequate. He told me he had no instructions from his clients on that and I was to proceed with the publication of the size I think was right.

Defendant's Counsel argued that Mr. Elias' omission to inform the defendant that "the deal was off" led the defendant to believe that the plaintiff's offer was still subsisting and that accordingly, when the defendant conveyed his acceptance of all the terms of the offer to Mr. Elias, there was a "waiver" (or "equitable" or "promissory" estoppel as it is sometimes called) of the strict requirement that the prepared apology was to be published "immediately". The submission is basically two pronged: first, an estoppel by representation by conduct (i.e. silence or omission), which is a rule of evidence precluding evidence to the contrary; second, a waiver of strict compliance with the terms of the offer. Defendant's Counsel offered no authority in support of his submission. Presumably, he was attempting to bring himself within the pronouncements of law in *Maclaine v. Gatty* [1921] 1 AC 376, amongst others, and *Hughes v. Metropolitan Ry.* [1877] 2 AC 439.

In *Maclaine v. Gatty*, Lord Birkenhead expressed the law on estoppel by representation in this way:

> Where A has by his words or conduct justified B in believing that a certain state of facts exists, and B has acted upon such belief to his prejudice, A is not permitted to affirm against B that a different state of facts existed at the same time. Whether one reads the case of *Pickard v. Sears*, or the later classic authorities which have illustrated this topic, one will not, I think, greatly vary or extend this simple definition of the doctrine.

Lord Cairns, dealing with "waiver" (or "promissory" or "equitable" estoppel) stated the law in *Hughes v. Metropolitan Ry.* [1877] 2 AC 439 as follows:

> It is the first principle upon which all Courts of Equity proceed, that if parties who have entered into definite and distinct terms involving certain legal results - certain penalties or legal forfeiture - afterwards by their own act or with their own consent enter upon a course of negotiation which has the effect of leading one of the parties to suppose that the strict rights arising under the contract will not be enforced, or will be kept in suspense, or held in abeyance, the person who otherwise might have enforced those rights will not be allowed to enforce them where it would be inequitable having regard to the dealings which have thus taken place between the parties.

However, it has not been raised by the defendant's Counsel, nor regrettably by the plaintiff's Counsel, that both these doctrines, if I may call them that, only apply where the representation or promise is "clear" or "unequivocal" or "precise and unambiguous". Though this requirement originated in the law relating to estoppel by representation (see, *Low v. Bouverie* [1891] 3 Ch 82 on 106), it is now frequently stated in relation to "waiver" (see *Bremer v. Vanden* [1978] 2 Lloyd's Rep 109 on 126) and, if one pushes a further distinction, to "promissory" (or "equitable") estoppel (see, *The Scaptrade* [1983] 1 All ER 301 on 304).

Applying the objective test approved by these numerous authorities, I have asked myself whether the alleged estoppel and waiver were "clear" and "unequivocal"? I have come to the conclusion that they were not. This is borne out by an analysis of the defendant's account of the telephone conversation he had with Mr. Elias on 26 According to the defendant, the first thing he said to Mr. Elias was that he "accepted all the terms of settlement or compromise". The defendant did not disclose to the Court whether Mr. Elias kept silent or responded to this intimation. The next thing the defendant has alleged to have said was, "I then asked him what the size of the apologies should be .... what was meant by 'appropriate prominence'. I informed him the sizes of the advertisements I had placed with the newspapers." According to the defendant, Mr. Elias said in response, "they were inadequate". In fairness to the defendant, if this is all there was to the conversation that took place, his Counsel may well have a point. But as his own affidavit shows, this was not the end of the conversation. According to the defendant, he then asked, "What size would be adequate". Mr. Elias' response is very important. He said, "he had no instructions from his Client" on the size and he further told the defendant that he could "proceed with the publication of the size" which he, the defendant, thought "was right".

To any reasonable man, Mr. Elias' response would have raised a doubt. If the offer was still subsisting, Mr. Elias would have known exactly the "adequate prominence" acceptable to the plaintiff, and what indeed puts the seal to this conclusion, was Mr. Elias' response that the defendant could proceed with the publication of a size he, the defendant, thought was right, giving a distinct impression to any reasonable person in the defendant's shoes that the whole question of size may well have been raised far too late to be of any significance or consequence as far as the offer went.

I wish to state that the approach I have adopted in examining the conversation between the defendant and Mr Elias is supported by law. Spencer Bower's "*Estoppel by Representation*" (3rd Edn.) a leading text in this area, summarises the law on the approach in two instructive paragraphs one pp. 85 - 87:

> Complex or qualified representations
>
> 87 It frequently happens that out of several statements, relating to the same subject-matter, contained in a document, or series of connected documents, or **made in the course of conversations,** or series of connected conversations, there is some one statement on which, if it could be isolated from the others, the representee could properly found an

estoppel. **But this isolation is not permissible.** The primary canon of construction, in the case of a complex representation of this character, is that all the statements or documents, if connected by express reference, or by identity of subject-matter, must be considered in their inter-relation and bearing upon one another, in order to ascertain whether from the whole of them, in their conjoint effect, the particular representation which the representor is alleged to be contradicting, can reasonably be inferred, and not rather some other representation of a more qualified, limited, or even totally different character, which the representor is not proposing to contradict, and in respect of which, therefore, no estoppel can be raised...

Oral representations

89 Precisely the same principles of construction are applied to a number of statements made by word of mouth on one and the same occasion. The second of the two early leading cases on the doctrine of estoppel by representation **furnishes a very good illustration of an oral representation being neutralized by others of an inconsistent character made immediately afterwards at the same interview, so as to negative the estoppel which might otherwise have arisen on the first statement.**
(the emphasis is mine).

To my mind, the point on estoppel and waiver fails as regards both this term and other terms of the offer. In the result, I find myself in complete agreement with the plaintiff's Counsel's submission that this term has not been performed in compliance with the terms of the offer, thereby entitling the plaintiff on this failure alone to revert to his original cause of action based on defamation.

(ii) **to be read by you at the next Singapore Union (sic) Front rally following delivery of this letter.**

In ascertaining whether or not the defendant has performed this term, it is important to recognize that, this application being the defendant's, the onus of proof is on him to satisfy the test of performance enunciated by Roskill J in the *Margaronis Navigation Agency's case* (see *supra*). In short, he must show that he has in fact read the apology prepared by the plaintiff's solicitors at the first Singapore United Front rally following the **delivery** of the said letter on 19 December 1984.

The defendant's alleged performance of this term has been deposed to by him in his affidavit:

8. In compliance with the said terms of offer, I apologised to the plaintiff in terms of the apology enclosed with exhibits "SKL1" and "SKL2" at my party's public rally at Bedok North Avenue 2 on 21 December 1984.

9. My apologies were noted by the Singapore Broadcasting Corporation ("SBC") and other reporters, SBC reported them the same night over radio and television, whilst the newspapers reported it the next day. I annexed copies of these reports, which are annexed in a bundle marked "SKL3".

It is to be observed from these two paragraphs that the defendant has not deposed **as a fact** that his party's public rally at Bedok North Avenue 2 on 21 was the first of its public rallies after the delivery of the plaintiff's solicitors' letter on 19. One has to infer this from the opening phrase of paragraph 8 of his affidavit, "In compliance with the said terms". But to infer such a conclusion would really be begging the question as to whether or not there was compliance. To satisfy the test of performance enunciated by Roskill J, the defendant would, in my view, have to categorically depose in his affidavit that the Singapore United Front rally at Bedok North Avenue 2 on 21 was the first after the delivery of the letter on 19. Regrettably, he has not and I am left with a very serious doubt as to whether he has performed this term.

My view is reinforced by the plaintiff's affidavit wherein he has deposed that "the defendant did not read out the apology at the next SUF rally after my Solicitors' letter was delivered to his residence on 19 December." This must mean that the defendant's party held a rally sometime between 19 when the letter was delivered and 21 when the letter and the apology was read out publicly at the rally at Bedok North Avenue 2. This could only mean in law that by the time the defendant read the letter on the 21st, the offer made by the plaintiff was incapable of acceptance, as the next Singapore United Front rally following the delivery of the letter on 19 had already been held. The defendant must himself accept the consequences of not reading the letter on 19.

> **Mr. Lee further requires you to give us your assurance and undertaking in writing that you will not repeat the same or similar statements concerning him.**

There is nothing in the defendant's affidavit to suggest that such a written undertaking was given by the defendant to the plaintiff. In fact, Counsel for the defendant has admitted in submission that even up to the time of the hearing of this application no written undertaking had been given. The defendant has therefore failed to perform this term as well.

In my opinion, this failure to perform runs counter to the defendant's contention that there has been accord and satisfaction. His conduct throughout has not evinced an intention to perform this term, though he did intimate to Mr. Elias on 26 that he accepted "all" the terms. At the risk of flogging the point on estoppel and waiver, I should also say that even if the conversation with Mr Elias on 26 did give rise to an estoppel and waiver of time stipulations, resulting in a consensus **ad idem** on terms less strict than those appearing in the letter of 19, the defendant's failure **thereafter** to perform this term and the next two terms had disentitled him from relying on these equitable defences. In *Re Goile* [1963] NZLR 666, where a compromise was struck in that a lesser sum was to be paid as settlement of a larger judgment debt, the judgment creditor was held entitled to proceed in bankruptcy on the full judgment debt upon the failure of the judgment debtor to pay the lesser sum. Turner J in the Court of Appeal expressed the following opinion:

> As a second ground to support his appeal, Mr. Patterson contended that the conduct of the parties, including the letters, was such as to estop the judgment creditor on the authority of such cases as *Central London Property Trust Ltd. v. High Trees House Ltd.* [1947] 1 KB 130; [1956] 1 ALL ER 256. We reject this submission. There are a number of factors which seem to us completely to distinguish this case from the *High Trees* cases, but it will be sufficient to mention one. Promissory estoppel is a form of equitable relief by which one of two parties to a bargain, whether that bargain is a matter of words or of conduct, is precluded from acting in disconformity to it if equity requires that he should adhere to it. Equity will require him to be bound by his arrangement, at least in the generality of cases, only if the other party has acted in confirmity to it; and here the opposite is the case. The sum of £1,000 which the parties contemplated as being payable "forthwith" after 23 May was not found. In these circumstances **it is useless to speak of equitable estoppel.**
>
> (Emphasis is mine).

Although there appears to be no necessity for me to rely on the plaintiff's affidavit, I think I ought to mention that it supports the conclusion I have drawn on the defendant's affidavit. The plaintiff's affidavit shows that the defendant had no real or genuine intention to undertake not to repeat the defamatory remarks again or to apologise "unreservedly". For not only did the defendant repeat the defamatory remarks by reading out the plaintiff's solicitors' letter of 19 in its entirety at the rally held on 21, he was also recorded to have followed up his apology at that rally with a statement which suggested that he may not have uttered remarks that were defamatory and that the prepared apology was read really

out of convenience as he wanted to avoid wasting time in "fighting a Court case."

> **We require to know if you are prepared to indemnify our Client in respect of the costs to which he has been put in the matter, which we now estimate at $500.**
>
> **Finally, we are further instructed to inform you that our Client claims damages. If you proceed in accordance with the preceding two paragraphs, our Client will accept nominal damages of $1,000/-.**

It is settled law that when no time is prescribed in respect of performance of a term, a reasonable time or period is envisaged. I do not consider that a tender of both the costs and nominal damages on 7 January 1985 i.e. 19 days after the offer was made, could by any stretch be regarded a performance of these two terms within a reasonable time, bearing in mind the circumstances of this case. At any rate, I take the view that this tender was of no effect as regards performance of these two terms, as it was made after the plaintiff had elected to sue on his original cause of action.

Furthermore, as regards the tender of the nominal damages of $1,000, the return was further justified in that the plaintiff's solicitors' letter of 19 clearly stated that the plaintiff would accept the nominal damages $1,000 if the defendant "proceed(ed) in accordance with the preceding two paragraphs". That is, only **upon** the condition that the defendant performed all the other terms. There is, in my view, no doubt that he has not performed all these other terms.

Eyre v. Wilson & Horton Limited

The last salvo in the battery of arguments canvassed by the defendant's Counsel came in the form of *Eyre v. Wilson & Horton Limited* [1967] NZLR 769, an authority cited for the proposition that where a defence pleads a binding settlement by way of compromise which, if established, would dispose of the action, an order should be made under the inherent jurisdiction of the Court for the proceedings to be stayed and for a determination before trial of the question whether the alleged compromise amounts to a binding settlement of the plaintiff' claim. On the strength of this authority, defendant's Counsel urged the Court to make orders to this effect.

In my view, this authority does not assist the defendant's application at all. This is clear from a careful reading of McGregor J's judgment. The learned Judge, after dealing with the facts, posed two question:

> First, whether the Court has jurisdiction to order the determination by a preliminary inquiry of the question whether the apology was agreed by the parties to be in satisfaction of the claim and, secondly, if so, whether the Court should in its discretion, make the orders sought.

The first question was answered in the affirmative as the learned Judge relied on *Kontvanis v. O'Brien* [1958] NZLR 502. In his words

> The authorities were considered by F.B. Adams J in *Kontvanis v. O'Brien* [1958] NZLR 502, where it was held that the Court had an inherent jurisdiction to prevent, both as vexatious and as an abuse of the procedure of the Court, a party from proceeding on a claim **after a compromise thereof has been duly performed by the opposing party** and an order was made for the determination before the trial of the action and in a summary way the question whether the alleged compromise and the payment made to the plaintiff thereunder amounted to a valid and binding settlement of the claims made by the plaintiff in the action. Accordingly a further order was made staying all proceedings until the determination of the preliminary question.

(Emphasis is mine).

The words under emphasis clearly suggest that the jurisdiction to order a stay and a question to be determined can only be exercised when all the facts supporting accord and satisfaction are before the Court. At least, I emphasize, from the affidavit(s) of the party who is applying for the stay and preliminary determination. If one examines *Eyre's case*, it is clear that the defendants there had "duly performed" all that the plaintiff desired. It appears from the facts narrated by the learned Judge from an affidavit filed (on p. 770) that the plaintiff, in the presence of his Counsel, informed the defendants at a settlement conference that if the defendants did not publish an apology a writ would be issued. The defendants acceded to this ultimatum and after clarifying certain matters published an apology corrected by the plaintiff's Counsel, and further corrected and approved by the plaintiff. The only issue not covered was a question of costs which was raised by the plaintiff's wife at the end of the conference, to which her own husband's Counsel remarked "that this would **not** arise." As the question of costs was not taken further, it would appear clear that costs did not constitute a term of the compromise agreed upon. It is therefore not surprising that when the issue of accord and satisfaction did eventually proceed for determination, the defendants' defence was upheld (see *Eyre v. NZPA* [1968] NZLR 736 on 743).

Are the factual elements of accord and satisfaction as clearly made out in our case? I am afraid that the defendant has not shown even on his own affidavit that he has performed all the terms of the offer of compromise, and in respect of at least one of the terms has, deliberately or otherwise, left the Court guessing as to whether there has been performance. In short, the defendant's case has not even reached a stage where there is a true "conflict of testimony" which warrants a Court to put a plaintiff on terms, a lesser alternative to striking out or stay (see, *Kontvanis v. O'Brien* [1957] NZLR 890).

The second question posed by McGregor J was also answered in the affirmative. The learned Judge said:

> Here it seems to me that the defendants in a trial before a jury would be prejudiced in their other defence, that the words published were a fair and accurate report of a public meeting and related to a matter of public interest when it could be shown that they had subsequently at the request and for the benefit of the plaintiff admitted the report was in some particulars incorrect and had apologised therefor. This would surely be an abuse of procedure if there has been an agreed settlement. In view of this position and accepting that there is an inherent jurisdiction to make an order staying proceedings and in view of the fact that the defence of accord and satisfaction, if established, would bring an end to the litigation, in my view the order should be made.

It is clear that McGregor J was convinced that the defendants "would be prejudiced" if he did not order a stay and a determination of accord and satisfaction before trial. The defendant, in our case, has not shown how he "would be prejudiced" if this action is not stayed and determination ordered. I certainly do not think he is in any position to raise the defence of fair comment on a matter of public interest.

On both questions raised by McGregor J, I fail to see how *Eyre's* case can be of assistance to the defendant. In one respect, it even goes against the defendant's application. For this case is authority that the question of accord and satisfaction must be a decisive issue before it can be ordered to be determined before trial. In my opinion, it may not be a decisive issue in our case and the need for it to be determined may not even arise. I say this because it would appear that the defendant through his own fault has not read the letter of 19 December in time for its acceptance. And if this is so, the only issue that may be relevant would be

the question of estoppel and waiver raised by the defendant's Counsel, which as I have explained would not assist the defendant even if they were made out, rendering as such the whole question of accord and satisfaction irrelevant.

All considered, I am of the view that this application must fail as it is procedurally misconceived. Not only has the defendant failed to show on his own affidavit that he has duly performed all the terms of the offer of compromise, he has also failed to convince me that he would be prejudiced in any way if this action proceeds to trial. The defendant has further failed to convince me that the issue of accord and satisfaction is a decisive issue that warrants determination before trial. I must therefore dismiss this application with costs.

I am informed by both Counsel that the arguments raised in this application apply to summons-in-chambers entered No. 2514/85 in S. 9331/84, which apart from the nature of the defamatory remarks, is on all fours with the application I have dismissed. In the circumstances, I order that the application in S.9331/84 be also dismissed with costs.

Also found at [1985] 2 CLJ 179